

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 235 of 1999

with

Civil Application No. 8358 of 1998.

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
1-5 No

SHANKARLAL HIRABHAI SHAH

Versus

PURSHOTTAMBHAI KHANABHAI SOLANKI

Appearance:

MR RAVI R TRIPATHI for appellant

MR AR LAKHIA for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 16/07/1999

ORAL JUDGEMENT

1. Admitted. Learned advocate Mr. A.R. Lakhia appears and waives service of notice of admission on behalf of respondent. At the request of learned advocates for the parties, the matter is taken up for final hearing today.

2. In this Appeal from Order, appellant herein has

brought in challenge order dated 26.3.1998 recorded below Exh.6, notice of motion, in Civil Suit No. 6099 of 1996 by learned City Civil Judge, Ahmedabad, whereby he allowed application Exh.6 submitted by respondent herein by granting temporary injunction in terms of para 6 (A) of the application till hearing of the suit by making rule absolute against the appellant herein.

Appellant herein is the original defendant and respondent herein is the original plaintiff and for the sake of convenience and brevity, the parties are hereinafter referred to as 'the plaintiff' and 'the defendant'.

3. The brief facts are:

3.1. Plaintiff is the owner and in occupation of block No.3, Room No.9 of Survey No. 00151 to 158 of Rakhial Ward No.2 since 1989. The said property consists of two rooms and verandah. The roof of the said property is covered by iron sheets and there is bathroom, latrine and chokdi in the verandah of the said property. Towards the south of verandah, there is a balcony, open to sky, admeasuring 25 x 10 ft. It was the case of the plaintiff that access to the said balcony is from the verandah. The plaintiff alleged that the defendant has put up an illegal construction below the balcony. It was the case of the plaintiff that the defendant has recently put up construction of cement roof, in place of iron sheets, on the room which was constructed by the defendant on the open space and it was decided amongst the residents that the cement roof converted out of iron sheets, shall not be used as terrace by the person owning the house on ground floor and the person who is owning the house on ground floor may use the margin land but not the space available above roof. It was further case of the plaintiff that the plaintiff is residing on the first floor and the defendant is residing on the ground floor and when the defendant constructed the room on the margin land towards the south of the property of the plaintiff the defendant has put up iron sheets over the said room. However, the defendant after some time, removed the iron sheets and started putting up cement roof. This action of the defendant was objected to by the plaintiff and other nearby residents. It was the case of the plaintiff that he informed the defendant that if such construction is put up by the defendant, the entire verandah of the plaintiff will be visible and his right of privacy will be infringed and there are chances of theft in his house since anybody can enter into his house with the help of the terrace of the defendant. It was further case of the

plaintiff that the defendant assured him that he will not use the terrace. It was the further case of the plaintiff that however, the defendant started using the terrace and the defendant has also threatened the plaintiff that he would construct one more room on the terrace. The plaintiff, therefore, filed the suit for restraining the defendant from using the terrace.

3.2. Along with the suit, the plaintiff also filed notice of motion, application Exh.6, for interim injunction restraining the defendant from using the terrace, during the pendency of the suit. Prima facie case and balance of convenience was also pleaded in favour of the plaintiff.

3.3. The defendant filed his written statement, Ex.13, and contested the suit as well as the notice of motion, Ex.6., inter alia contending that the plaintiff is not the owner of the premises in his occupation and the said premises belong to one Kashiben Jaysingh Parmar. It was further contended by the defendant that the property has been allotted to him on 28.3.1980 and he is in possession of the property in question since 11.4.1980 and upon his land he has put up construction in 1981. It was further pleaded by the defendant that he has completed the construction of the roof and that he has been using the same since 1996. It was, therefore, prayed that the application Ex.6 being devoid of merits, the same may be rejected.

3.4. The learned trial Judge, after hearing learned advocates for the parties and after perusing the material on record and the report of the Commissioner, recorded the conclusion that defendant has replaced iron sheets with pakka roof made of cement. Learned trial Judge has also held that the defendant has put up parapet wall covering the roof from its sides. The learned trial Judge has also arrived at the conclusion that the facts submitted by the plaintiff are supported by the report of the Commissioner. It was further held by the learned trial Judge that use of the disputed terrace by the defendant would infringe the right of primacy of the plaintiff and there will be easy access to the house of the plaintiff with the help of the said terrace. Therefore, the learned trial Judge allowed Exh.6 application by granting injunction as prayed for by the plaintiff. It is this order which is under challenge in this Appeal from Order.

4. I have heard learned advocate Mr. Tripathi for the appellant and learned advocate Mr. Lakhia for the

respondent, who have made their elaborate submissions.

5. After having heard the learned advocates for the parties and perusing the impugned order and the facts and circumstances emerging from the record of the case, it is clear that following facts are not disputed:

- A) Plaintiff is not the owner of block No.3, Room No.9 of Survey No. 00151 to 158 of Rakhial Ward No.2. However, he is occupier of the said block by virtue of agreement between him and previous owner Kashiben.
- B) The property occupied by the plaintiff consists of two rooms and a verandah and the roof of the property is covered by iron sheets.
- C) Defendant's property is situated on the ground floor. Defendant has put up construction of a room on the margin land and on the top he put iron sheet as roof. However, subsequently he replaced the iron sheet with cement roof.
- D) Construction of the cement slab on the top of the room is over and the terrace is being used by the defendant and at present also he is using the terrace.

6. On the above said undisputed facts, it is clear that the property of the plaintiff is easily visible from the defendant's terrace. This situation is bound to be there in every residential flat system. Therefore, it cannot be said that the right of privacy is infringed because the defendant has constructed terrace on his own land which was allotted to him under the scheme.

7. In view of the aforesaid state of affairs, I am of the opinion that the learned trial Judge has committed an error of law as well as facts in granting injunction in favour of the plaintiff and against the defendant. In residential flat system, one can easily see windows and balcony of other flats and also inhabitants and thereby it cannot be said that privacy of any occupant is infringed. Moreover, the defendant has put up construction of the said room after obtaining permission from the Corporation. Since there is no question of infringement of right of privacy of the plaintiff, the impugned order is required to be quashed and set aside and the defendant cannot be prevented from using the terrace of his property. However, the defendant can be prevented from putting up further construction on the

terrace till the disposal of the suit.

8. In the result, the appeal succeeds in part and it is accordingly, partly, allowed to the aforesaid extent with no order as to costs. The impugned order dated 26.3.1998 passed by the learned City Civil Judge, Ahmedabad, below notice of motion, application Ex.6, in Civil Suit No. 6099 of 1996 is quashed and set aside. Resultantly, there is no injunction restraining the defendant from using the terrace of his property. However, the defendant is restrained from putting up any further construction on the terrace of his property till the final disposal of the suit.

9. Before parting, it is clarified that no observation made hereinbefore shall be construed as an expression of final opinion about the merits or demerits of the case which is still to be decided by the trial Judge uninfluenced by whatever observation is made hereinbefore, on the basis of the material that may be produced before him, in accordance with law. It is hoped that the trial Court shall hear and dispose of the suit finally as expeditiously as possible and preferably within one year from the receipt of writ of this order.

10. There shall be no order on the civil application.

(karan)